

**Before the
Federal Communications Commission
Washington, D.C. 20554**

In the Matter of:)	
)	
Centex Television Limited Partnership)	
)	CSR-6986-N
Petition for Waiver of Section 76.92(f))	
of the Commission's rules)	

ORDER ON RECONSIDERATION

Adopted: September 27, 2010

Released: September 28, 2010

By the Associate Chief, Media Bureau:

I. INTRODUCTION

1. Centex Television Limited Partnership, licensee of television broadcast station KXXV (ABC), Waco, Texas ("KXXV"), has filed a petition for reconsideration of the Bureau's decision denying KXXV's petition seeking a waiver of the Commission's significantly viewed exception to the network nonduplication rules.¹ KXXV subsequently filed a supplement to its petition. No opposition to this petition has been received. For the reasons discussed below, we deny KXXV's petition for reconsideration.

II. BACKGROUND

2. Upon the request of a local television station with exclusive rights to distribute a network or syndicated program, a cable operator generally may not carry a duplicating program broadcast by a distant station.² Under Sections 76.92(f) and 76.106(a) of the Commission's rules, however, a signal otherwise subject to deletion is exempt from application of the exclusivity rules if it is "significantly viewed" in a relevant community (the "significantly viewed exception").³ The Commission's rules generally provide stations such protection within a station's 35-mile geographic zone.⁴ The significantly viewed exception to the exclusivity rules is based on a demonstration that an otherwise distant station

¹*Centex Television Limited Partnership*, 22 FCC Rcd 1713 (2007).

²*See* 47 C.F.R. §§76.92 and 76.101.

³ 47 C.F.R. §§ 76.92(f) and 76.106(a); *see* 47 C.F.R. §§ 76.5(i) and 76.54.

⁴The 35-mile geographic zone of all major markets and the 55-mile geographic zone around all smaller markets extend from the reference point of the community of license of the television station. These reference points are listed in Section 76.53 of the Commission's rules. Where a community's reference point is not given, the geographic coordinates of the main post office in the community shall be used. *See* 47 C.F.R. §§ 73.658 and 76.53.

receives a “significant” level of over-the-air viewership in a subject community. If this viewership level is met, the station is no longer considered distant for purposes of the application of the exclusivity rules because it has established that it is viewed over the air in the subject community.

3. In the 2005 Report and Order implementing Section 340 of the Communications Act, the Commission adopted a rule for satellite carriage that mirrors the rules for cable carriage.⁵ Accordingly, the amended Sections 76.122(a) and (j) and 76.123(a) and (k) of the Commission’s rules allow a station or distributor with exclusive rights to network or syndicated programming to assert exclusivity protection to require satellite carriers to delete such programming. The duplicating station may respond to such assertions by claiming the significantly viewed exception.⁶ The party asserting exclusivity protection may request a waiver of the significantly viewed exception from the Commission by demonstrating that the station is no longer significantly viewed in a particular community or communities.⁷ If the waiver is granted, the duplicating programming must be deleted by a cable operator or satellite carrier if the station is carried in a community in which the station has been shown to no longer be significantly viewed. It should be noted that the station itself is not removed from the significantly viewed list and may continue to be carried, provided the necessary programming deletions are made.⁸

4. In order to obtain a waiver of the significantly viewed exception to the exclusivity rules, the Commission held in *KCST-TV, Inc.*⁹ that petitioners would be required to demonstrate for two consecutive years that a station was no longer significantly viewed, based either on community-specific or system-specific over-the-air viewing data, following the methodology set forth in Section 76.54(b) of the Commission’s rules.¹⁰ Under Section 76.5(i) of the Commission’s rules, network stations¹¹ are considered significantly viewed if the survey results show more than a 3 percent share of total viewing hours and a net weekly circulation of 25 percent, by at least one standard error.¹² Independent stations

⁵*Implementation of the Satellite Home Viewer Extension and Reauthorization Act of 2004; Implementation of Section 340 of the Communications Act*, MB Docket No. 05-49, Report and Order, 20 FCC Rcd 17278 (2005) (“*SHVERA Significantly Viewed Report and Order*”).

⁶47 C.F.R. §§ 76.122(j)(2) and 76.123(k)(2).

⁷*See KCST-TV, Inc.*, 103 FCC 2d 407 (1986).

⁸*See SHVERA Significantly Viewed Report and Order*, 20 FCC Rcd 15 17295-26; *see also* 47 U.S.C. § 340(e)(2).

⁹103 FCC 2d 407 (1986).

¹⁰ Section 76.54(b) describes the required survey procedures for adding a station to the significantly viewed list based on community or system-specific surveys. For the addition of a station to the list, only one year’s surveys are required. In *KCST-TV, Inc.*, the Commission required that the data demonstrate viewing levels for two years. In the *SHVERA Significantly Viewed Report and Order*, we clarified that the independent professional audience surveys required by Section 76.54 of our rules must include surveys only from households that receive broadcast signals via an over-the-air antenna and thus amended Section 76.54 to change “noncable” to “over-the-air.” *See SHVERA Significantly Viewed Report and Order*, 20 FCC Rcd 15 17292-23.

¹¹ For purposes of determining whether to use the network or non-network standard for audience share, the Commission relies on the definition of network and independent station in our rules. Thus, for such purposes, affiliates of the ABC, CBS, and NBC networks are “network stations.” *See* 47 C.F.R. §76.5(j) and (k). Other stations are treated as independent stations for this limited purpose. *See* 47 C.F.R. §76.5(j); *SHVERA Significantly Viewed Report and Order*, 20 FCC Rcd at 17293-34.

¹²47 C.F.R. §76.5(i).

(i.e., non-network stations), are considered significantly viewed if the survey results show more than a 2 percent share of total viewing hours and a net weekly circulation of 5 percent, by at least one standard error.¹³ The Commission has found this test is also applicable for waivers of the syndicated exclusivity exemption.¹⁴

5. Since the Commission's decision in *KCST-TV*, the methodology required by Section 76.54(b) of the rules for a petitioner seeking an exception to the significantly viewed exception has evolved, pursuant to case law and market realities. Section 76.54(b) states in pertinent part that significant viewing "may be demonstrated by an independent professional audience survey of [over-the-air] television homes that covers at least two weekly periods separated by at least thirty (30) days but no more than one of which shall be a week between the months of April and September."¹⁵ Over time, The Nielsen Company became the primary surveying organization through which a petitioner could obtain television surveys.¹⁶ Nielsen, which routinely surveys television markets to obtain television stations' viewership, conducts four-week audience surveys four times a year (i.e., February, May, July, and November "sweep periods"). The Bureau has found that replacing each week required under *KCST-TV* with a sweep period is acceptable and, if anything, adds to the accuracy of the audience statistics because of the increased sample size.¹⁷ Accordingly, a petitioner may submit the results from two sweep periods in each year. For use in exclusivity waivers, a petitioner may purchase survey data from Nielsen on either a community-specific or system-specific basis.¹⁸ If a petitioner is purchasing survey data on a system-specific basis where two or more communities are involved, the percent of diaries from each community surveyed must be approximately the same as the percentage of the total population for each community served by the cable system.¹⁹ In order to produce the data required for exclusivity waivers, Nielsen re-tabulates the over-the-air data that it collects for its routine audience sweep periods, selecting "in-tab"

¹³ *Id.*

¹⁴ See *Chambers Cable of Oregon, Inc.*, 5 FCC Rcd 5640 (1990).

¹⁵ 47 C.F.R. § 76.54(b). The criteria set forth in *KCST-TV* require that two separate surveys be performed pursuant to Section 76.54(b) in consecutive years. The provisions of Section 76.54(b) therefore apply to each year's survey. It should be noted that these types of surveys cannot be done by the affected television station, cable system or satellite operator.

¹⁶ Nielsen Media Research recently changed its name to The Nielsen Company. Previously, there was at least one independent research firm that conducted audience surveys for this purpose.

¹⁷ Although, in general, petitioners are prohibited from using two surveys between April and September (i.e., May or July sweeps), we have not ruled out a petitioner providing all sweeps in a year where more than two are submitted. See *WTNH Broadcasting, Inc. and K-W TV, Inc.*, 16 FCC Rcd 6781, 6784 (2001), where the Bureau did not reject the petition because of the inclusion of both May and July data, but only concluded that, in such a case, it would be necessary to provide individual survey period results so that we could determine the effect of the third and fourth sweep periods.

¹⁸ It should be noted that Nielsen identifies individual communities by zip codes, a process not incompatible with the surveying process discussed here.

¹⁹ 47 C.F.R. § 76.54(b). Proportionality based on population demonstrates that more weight is given to larger communities. While there must be at least one diary from each community in each survey, there is no minimum sample size since the standard error allows us to be sure that there is a high probability that the reported result meets or falls below our criteria. Because Nielsen is able to weight its sampling, they can provide such proportionality.

diaries²⁰ from its database from the area served by a cable system or an individual cable community.²¹ It should be noted that, despite the fact that a petitioner is purchasing a re-tabulation of data that has already been collected, it is still obligated to notify interested parties prior to the purchase of such data pursuant to the requirements set forth in Section 76.54(c) of the Commission's rules.²² Such notice should indicate the surveying organization, the methodology used to calculate the viewing shares (e.g., a description of the process used to re-tabulate the information in an existing database), the manner in which the communities (and/or zip codes) were selected, and the survey periods used.²³ Notification to interested parties before the purchase of Nielsen data allows a petitioner to correct any errors or clarify issues related to the methodology before the data are purchased and the petition is actually filed and, perhaps, avoid the filing of unnecessary or misinformed oppositions. Finally, we note that the manner in which surveys based on sweep periods are averaged remains the same as for weekly surveys.²⁴ A petitioner therefore may submit the average of the two sweep periods for each year. If, however, a petitioner submits more than two sweep periods, in addition to the average or combined audience shares for the year, it must also include the separate sweep data for each individual sweep period used. This ensures that the reported audience results data are not skewed by the choice of sweep periods.

6. In its request, KXXV sought a waiver of the significantly viewed exception to the network nonduplication rules so that it could assert its rights to network nonduplication against stations KTXS-TV, Sweetwater, Texas, and WFAA-TV, Dallas, Texas, in cable systems operating in Mills and McLennan Counties, Texas. The Bureau denied KXXV's request due to its failure to include a description of the methodology used to conduct the viewership surveys relied upon in its petition. In addition, KXXV's petition appeared to be seeking a waiver on a county-wide basis, rather than on a community-specific or system-specific basis, as required by these types of waivers. In the instant petition, KXXV seeks reconsideration only with regard to WFAA-TV, submitting revised information, which it argues meets the criteria required for waiver in the following communities located in McLennan

²⁰In-tab diaries are the number of diaries included in the tabulation of audience shares. Of the returned diaries, some are discarded after editing as being unusable. Thus, it is the number of diaries in the sample used to calculate the audience statistics.

²¹We expect petitioners who commission such data to include, along with the survey data itself, a description of the procedures used to re-tabulate the data, which data base it is using, what communities (or zip codes) are covered, the station(s) surveyed, and time periods covered. Because Nielsen routinely provides this information in a cover letter along with its survey data, it is most helpful if this letter is included. This eliminates any doubt that the data provided was provided by Nielsen. See e.g., *Radio Perry, Inc.*, 11 FCC Rcd 10564, 10568-9 (1996); *Gulf-California Broadcast Company*, 21 FCC Rcd 3476, 3479-80 (2006). We further suggest that the petitioner make it clear that the data they are submitting, along with the description of methodology, are as agreed on between the petitioner and Nielsen.

²²47 C.F.R. § 76.54(c). Section 76.54(c) states that "[n]otice of a survey to be made pursuant to paragraph (b) of this section shall be served on all licensees or permittees of television broadcast stations within whose predicted Grade B contour the cable community or communities are located, in whole or in part, and on all other system community units, franchisees, and franchise applicants in the cable community or communities at least (30) days prior to the initial survey period."

²³*Id.*

²⁴Section 76.54(b) states that "[i]f two surveys are taken, they shall include samples sufficient to assure that the combined surveys result in an average figure at least one standard error above the required viewing levels. If surveys are taken for more than 2-weekly periods in any 12 months, all such surveys must result in an average figure at least one standard error above the required viewing level."

County which are served by Time Warner Cable – China Spring, Hewitt, Lorena, McGregor, and Waco, Texas.²⁵

III. DISCUSSION

7. The issue before us is whether to grant, on reconsideration, KXXV's request for waiver of the significantly viewed exception to the network nonduplication rules which was denied by the *Bureau Order*. KXXV initially submitted combined viewership data for the subject system on a system-specific basis, pursuant to Section 76.54(b) of the Commission's rules. On reconsideration, KXXV submitted revised survey data, but deleted one of the original system communities. We deny KXXV's petition because the survey data provided fails to meet the requirements of Section 76.54(b) of the rules.

8. In support of its request, KXXV submits revised survey data correcting the deficiencies found in its previously filed survey results.²⁶ Initially, the survey data provided by KXXV in its petition for reconsideration also included the community of Elm Mott.²⁷ However, KXXV subsequently deleted that community, stating that there was insufficient data obtained from Nielsen to include Elm Mott in the combined survey.²⁸ KXXV also submitted new audience survey data to reflect this change.²⁹ The audience data for the first year are from the February 2005, May 2005, and November 2005 audience sweep periods and for the second year from the February 2006, May 2006, and November 2006 audience sweep periods.³⁰ Along with this data, KXXV submits a description of the methodology used for the special tabulations of Nielsen data that indicates that the surveys are based on in-tab noncable/non-ADS household data for a series of zip codes.³¹ Moreover, the methodology description also includes the zip codes surveyed, the data base from which the data was drawn, and the methodology used to calculate the audience estimates and standard errors.³² For each year, the reported audience statistics are presented for the individual sweep periods as well as the combined audience average for each year.³³ As a result, KXXV's showing meets the requirements regarding the description of the methodology and the submission of individual audience sweep period results when more than two survey periods are included for each year's showing.

9. We do not find that KXXV has made the requisite showing for WFAA-TV for the communities of China Spring, Hewitt, Lorena, McGregor, and Waco, Texas. KXXV stated in its petition that it was specifically seeking reconsideration for the communities served by Time Warner that were located in McLennan County, Texas and that its submitted audience survey was a combined study of

²⁵Reconsideration at 3. KXXV states that Nielsen Media Research has insufficient sampling data to demonstrate that KTXS-TV is no longer significantly viewed in the communities that comprise Mills County, Texas.

²⁶*Id.*

²⁷*Id.*

²⁸Reconsideration Supplement at 1.

²⁹*Id.* at Exhibit 1.

³⁰*Id.*

³¹*Id.*

³²*Id.*

³³*Id.*

multiple communities – in other words a system-specific survey.³⁴ By removing the community of Elm Mott, KXXV is no longer conducting a system-specific study. Section 76.54(b) of the Commission's rules states that "[i]f a cable system serves more than one community, a single survey may be taken, provided that the sample includes over-the-air television homes from each community that are proportional to the population."³⁵ Therefore, a system-specific survey must include every community served by a system and the overall sample must meet the proportionality requirements. In situations, such as here, where there are insufficient in-tab households for a proper system-specific study, the problem can be remedied by simply providing data on a community-by-community basis for those communities that have a sufficient sample to determine if the viewing level criteria are met. In this case, KXXV did not provide any community-specific data. As a result, because the survey results submitted in KXXV's supplement do not meet the requirements of a system-specific survey and the submitted data cannot be analyzed on a community-by-community basis, we cannot conclude that WFAA-TV is no longer significantly viewed in the communities of China Spring, Hewitt, Lorena, McGregor, and Waco, Texas.³⁶

IV. ORDERING CLAUSES

10. Accordingly, **IT IS ORDERED**, that the petition for reconsideration filed by Centex Television Limited Partnership **IS DENIED**.

11. This action is taken pursuant to authority delegated under Sections 0.283 and 1.106 of the Commission's rules.³⁷

FEDERAL COMMUNICATIONS COMMISSION

Nancy Murphy, Associate Chief
Media Bureau

³⁴Reconsideration at 3-4.

³⁵47 C.F.R. § 76.54(b).

³⁶It should be noted that even if KXXV had relied on its originally-submitted survey data, it would have been rejected because the data for the second year did not include the in-tab households from one community "Elm Mott," in violation of the requirement in Section 76.54(b) of the rules that each community be represented in a system-specific sample.

³⁷47 C.F.R. §§ 0.283 and 1.106.